INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	9

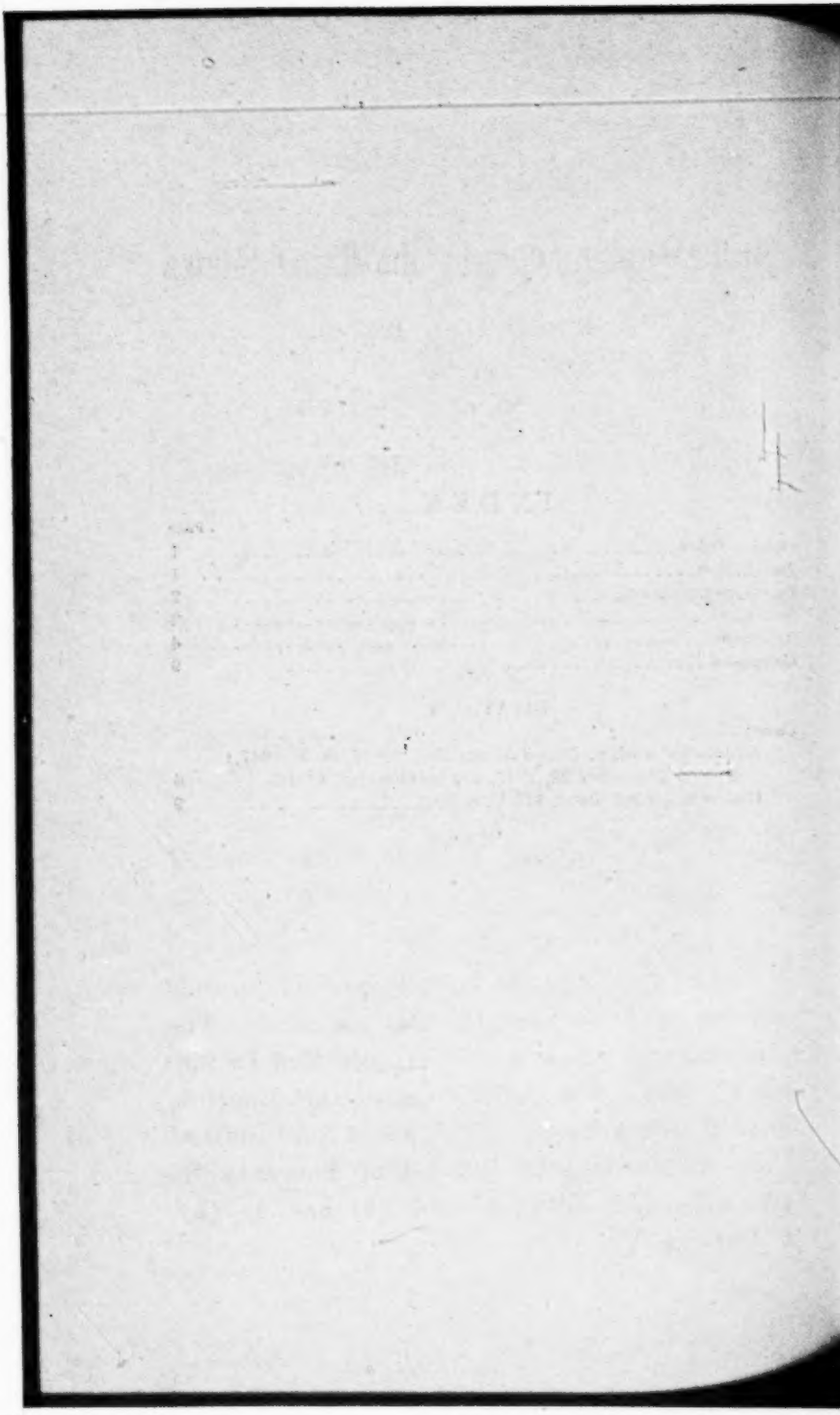
CITATIONS

Cases:

Blumenthal et al. v. *United States*, Nos. 54–57, O. T. 1947, decided December 22, 1947, slip opinion, pp. 10–13 6

Glasser v. *United States*, 315 U. S. 60 9

773316—48



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 479

AUSTIN MILLER STATLER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 585) has not been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 18, 1947 (R. 585). The petition for a writ of certiorari was filed December 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Whether the trial court committed reversible error:

1. in refusing to grant petitioner a trial separate from that of his coconspirator and accomplice; and

2. in denying petitioner's motion for a judgment of acquittal, on the contention that the only substantial evidence of guilt was the testimony of coconspirators, whose testimony allegedly was discredited.

STATEMENT

Petitioner and five other persons (Thomas Jackson Matthews, Buster Sparks, Julian Ferrell Sparks, James Edward Sparks, and Claude Lonnie Neal) were indicted for conspiracy to violate the National Stolen Property Act[1] (R. 2–18). Petitioner and three of the other defendants (Matthews, Neal, and James Edward Sparks) were also jointly indicted in two counts of the same indictment for substantive violations of the act[2] (R. 19). All the defendants except petitioner and Matthews pleaded guilty (R. 144, 233, 361, 502). They were convicted on all three counts after a joint trial (R. 31–32), and petitioner was sentenced generally to five years' imprisonment (R. 32–33). On appeal by Matthews and petitioner, the circuit court of appeals af-

[1] 18 U. S. C. 418a.
[2] 18 U. S. C. 415.

firmed the conviction as to both defendants (R. 585), holding in a *per curiam* opinion (*ibid.*) that there was abundant evidence to support the verdict and no reversible error shown by the record.

At the outset of the trial, petitioner moved for a severance on the ground that introduction in evidence of statements made to F. B. I. agents by his codefendants would be prejudicial, particularly if such statements did not refer to the fact, where it was a fact, that the maker of the statement had a previous criminal record (R. 21–22). The motion was overruled (R. 23). In the course of the trial, all the codefendants who had pleaded guilty appeared as witnesses for the Government (R. 144, 233, 322, 361). Matthews did not take the stand. A statement made to an F. B. I. agent by Matthews after his arrest was read to the jury (R. 393–397), with the usual cautionary instructions by the court (R. 391, 392, 398, 515; see pp. 4–6, *infra*), but the statement itself was not admitted in evidence (R. 398, 554–555).

At the close of the evidence, defendants moved for a judgment of acquittal on the ground that there was no substantial evidence of guilt and that "all the substantial evidence is as consistent with innocence as with guilt" (R. 30, 501).

After verdict, petitioner moved for a new trial (R. 564–567). One of the grounds of the motion

was alleged prejudice to petitioner arising from the reading of Matthews' statement without his taking the stand so that petitioner, through cross-examination, might show that Matthews had testified for the Government before the grand jury and that he had a previous criminal record. The motion for a new trial was overruled (R. 568).

ARGUMENT

1. Petitioner's contention that it was error to deny him a separate trial is based upon the action of the trial court in permitting the reading of Matthews' pretrial statement to the jury (Pet. 11–16). The record shows, however, that petitioner's rights in connection with the reading of this statement were fully protected. In introducing the statement, government counsel said (R. 390):

> If it please the Court, I want to introduce at this time the statement of this man, of Thomas Jackson Matthews, and I want to ask that the Jury be instructed this statement is to be limited in its effect as against the subject Matthews.

Before the statement was read, the court said (R. 391):

> Now, gentlemen of the Jury, this statement is being received in this case as evidence against the Defendant Matthews. It is not evidence against the Defendant Statler. You will only consider it in the case insofar as the Defendant Matthews is concerned.

And again, when petitioner objected to the reading of any part of the Matthews statement containing a reference to petitioner, the court said (R. 392):

> I have already told you, gentlemen, now this statement is made by the Defendant Matthews, and it was made after these parties had been arrested, and after any conspiracy would be over. The conspiracy would be at an end at that time, and this statement would not be binding on the Defendant Statler, and is not to be considered under any circumstances by you as any evidence against the Defendant Statler. Whatever is in this statement is only evidence as against the Defendant Matthews.

After the statement was read the court again said (R. 398):

> Now, gentlemen, I want to caution you again about that statement. That statement is only evidence as against Matthews. It is shown here that it was taken from him in his own attorney's office. It is not evidence against the Defendant Statler, and is not to be considered against him at all in any way in this case, and is no evidence to connect Statler with any of these transactions.

In its charge to the jury, the court first discussed the evidence in connection with defendant Matthews (R. 514–515). In summarizing Matthews' statement to the F. B. I. agents, the court refrained from referring to any mention

of petitioner therein (R. 515). Immediately upon completing his summary of the evidence relating to Matthews, the court said (R. 515):

> In connection with that statement of Matthews, I want to caution you again, gentlemen of the Jury, that that statement was received as evidence only against the Defendant Matthews. That statement was taken after these parties had been arrested, and after the conspiracy, if there was a conspiracy, was at an end, and anything in that statement as to the Defendant Statler would be hearsay and is not admissible in this case against Statler, and is under no circumstances to be considered by you as any evidence against Statler in this case.[3]

Under the recent decision of this Court in *Blumenthal et al.* v. *United States,* Nos. 54–57, O. T. 1947, decided December 22, 1947, slip opinion, pp. 10–13, it is clear that the cautionary instructions of the court were sufficient to protect petitioner from any prejudice arising from the reading of the Matthews statement. Only petitioner and Matthews were on trial; the statement was competent against the coconspirator Matthews; and there is no contention that the testi-

[3] The court's statement, referred to by petitioner (Pet. 14–15), that the Matthews statement "corroborated certainly to some extent the statements of Sparks and Neal" preceded the portion of the charge quoted, and was made directly in the course of his review of the evidence concerning Matthews.

mony against petitioner, if believed by the jury, was not sufficient to support the verdict.

The only reason advanced by petitioner for the granting of a separate trial was the possibility of the Government's introducing statements by coconspirators without petitioner's having an opportunity to confront and impeach the credibility of the makers thereof. Since the only such statement presented was carefully kept from the jury in connection with the case against petitioner, there obviously was no abuse of discretion by the court in overruling petitioner's motions for severance and for a new trial.

2. Petitioner contends that there was no substantial evidence of his guilt. He asserts that the only evidence was "uncorroborated testimony of Lonnie Neal and James Edward Sparks," co-defendants and accomplices of petitioner, and that such testimony was so discredited "as to require corroboration in order that it may support a conviction" (Pet. 16–21).

Petitioner does not dispute the established principle of law that a conviction may be based upon uncorroborated testimony of accomplices (Pet. 16). In charging the jury, the trial court said (R. 522–524):

> As I say, you have the right to consider the interest of all the witnesses. You have a right to consider the interest of the Defendant in the case. There is testimony here by James Edward Sparks,

Claude Lonnie Neal, Julian Ferrell Sparks, and Buster Sparks. All of those witnesses are alleged to have been parties to the crimes which the Government charges here were committed, and they are accomplices. They were involved themselves in these transactions, and they have already plead guilty to them. And you have got a right to consider that fact, and it is your right and duty to receive evidence of an accomplice with caution and to scrutinize that testimony with care. It should be carefully scrutinized. You have got a right to examine all of the testimony to see whether or not the testimony of accomplices is corroborated in any material respect, but after you have considered it, scrutinize it carefully and with caution. * * * It is not necessary that the testimony of an accomplice be corroborated by testimony of other witnesses, provided as I say you believe that evidence, and believe it to be true, then you have a right to act upon it.

* * * * *

There is testimony here that some of these witnesses have been convicted of crimes involving moral turpitude. That testimony is permitted for you to consider. It goes to the credibility of the witness, and is to be considered by you in connection with the weight that you will give to the testimony of any witness that is shown to have been convicted of a felony or a crime involving moral turpitude. * * *

Counsel for petitioner did not object to the court's charge concerning the testimony of accomplices.[4] It is not claimed that the testimony of the accomplices, if believed by the jury, was insufficient to sustain the verdict. The credibility of witnesses is entirely within the province of the jury. *Glasser* v. *United States*, 315 U. S. 60, 80. In determining this question the jury had complete and accurate instructions.

Two courts have found that the evidence was sufficient to sustain the verdict of guilty, and, under the circumstances, even granting petitioner's basic contention that the only substantial evidence of his guilt was the uncorroborated testimony of his accomplices,[5] there is no occasion for further review by this Court.

CONCLUSION

The case was correctly decided below. There are no questions of importance or conflict of deci-

[4] Counsel expressly stated that "we have no exceptions to the charge" (R. 525). He merely called the court's attention to his failure to refer to one bit of evidence relating to petitioner's alibi. The court thereupon corrected this omission.

[5] The record shows that such evidence was not totally uncorroborated. For example, one of the means of identifying petitioner in the transaction testified to by several witnesses was the fact that he was driving a light gray 1940 Dodge coupe (R. 149, 238, 365, 433). Petitioner confirmed the description of his automobile (R. 470). Neal's testimony concerning petitioner's presence in Marks, Mississippi, on two occasions (R. 145–146, 149), was corroborated by Pearson, an independent witness (R. 363 ff.). Petitioner's knowledge of and access to the checks involved is shown throughout the record, including petitioner's own testimony (R. 450 ff.).

sions involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPHINE H. KLEIN,
Attorneys.

JANUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948